Department of Justice Canada | Ministère de la Justice Canada

Canada

Speech for The Honourable Irwin Cotler,
Minister of Justice and Attorney General of Canada

Proposal for the Reform of the Supreme Court of Canada Appointments Process

Ottawa , Ontario

Thursday, April 7, 2005

Check against delivery.

Mr. Chair, Members of the Committee,

I am pleased to be here today to outline the Government's proposal for the reform of the Supreme Court of Canada appointments process. This proposal fulfils the Government's commitment to ensuring greater transparency and increased public confidence in the exercise of this important power, while providing for significant Parliamentary and provincial involvement and input.

Before I begin, permit me to thank all of the individuals and groups who have added their voices to this important debate. I have considered a diversity of views from a broad range of constituencies and perspectives – lawyers, judges, domestic and international academics, Parliamentarians, provincial legislators and others. The proposal which I will outline today is the product of careful consideration of all of these points of view.

In particular, I would like to thank the members of the Justice Committee from the last Parliament, whose May 2004 report forms the anchor of the proposed reform I will be sharing with you today. I also would like to thank the members of the Interim *Ad Hoc* Committee on Supreme Court Appointments, which reviewed the nominations of Justices Abella and Charron last summer. The insights which we have gained from both the Justice Committee hearings and the *Ad Hoc* Committee proceedings underpin this reform initiative.

Throughout the public discussions on this issue, there have been two important and recurring themes, which have formed the backdrop of the Government's deliberations. First , the review of the appointments process is a task of great importance to our country, given that the Supreme Court is at the pinnacle of our court system and that our court system is a fundamental pillar of our constitutional democracy. It is the court of last resort for all legal disputes in Canada , most notably those involving questions of federal and provincial jurisdiction under the Constitution as well as those concerning rights violations under the Charter.

The second theme is the reputation of the Supreme Court as an example of excellence whose judicial legacy has resonated beyond Canada . Indeed, the Supreme Court is respected throughout the country – indeed around the world – as a model of what a vital, modern and independent judicial institution should be. Nothing should be done to jeopardize that important legacy.

Just over a year ago, I appeared before the Justice Committee in order to describe the current appointments process. At that time, I suggested that the development of a revised appointments process should be guided by a set of framework principles. One year later, these principles continue to provide a roadmap for the Government in framing the proposal I am sharing with you today.

May I take a few moments to briefly reaffirm these principles.

The first is merit. The overriding objective of the appointments process is to ensure that the best candidates are appointed, based on merit. I have described the criteria of merit in my appearances last year before the Justice Committee and the *Ad Hoc* Committee. These criteria would continue to be used in assessing candidates for the Supreme Court bench.

Within the framework of merit, the Supreme Court of Canada bench should to the extent possible reflect the diversity of Canadian society. A diverse bench ensures that different and plural perspectives are brought to bear on the resolution of disputes.

The second principle is the constitutional framework. Any reform of the appointments process must be rooted in the recognition that the appointment of Supreme Court judges is within the constitutional authority of the Governor-in-Council. This ensures that the executive branch of government remains responsible and accountable for the exercise of this important power.

Third is judicial independence and the integrity of the courts. The system should protect and promote the reality and perception of judicial independence. The independence of the judiciary ensures that legal claims are adjudicated by fair, impartial and open-minded judges who are not beholden to any group, interest or stated public position. The system should also preserve the integrity of the Supreme Court of Canada and the court system generally – institutions that are vital for the maintenance of the rule of law and the health of Canada 's democracy.

The fourth principle is transparency. Simply put, the Supreme Court appointments process should be more transparent. Where, as in this case, a high degree of confidentiality is required for the process to function properly, transparency is accomplished in two ways. First, ensuring the process is publicly engaged, known and understood. Second, structuring the process to bolster public confidence that decisions are made for legitimate reasons that are not linked to political favouritism or other improper motives.

Fifth, Parliamentary input. The Government has clearly committed itself to ensuring meaningful Parliamentary input. Parliamentarians are the representatives of Canadians and are therefore in a unique position to contribute to the transparency and accountability of the advisory committee process and of the consultative and evaluative dimensions of the process.

Finally, provincial input. The importance of provincial input, which has been recognized in the process used currently, reflects in part the role of the Court in determining federal-provincial disputes and in interpreting provincial law.

We appreciate that provincial governments have traditionally sought a more formal role in the appointment process. The government proposal responds in four ways. First, attorney(s) general of the region in question would be consulted by the Minister in the initial development and identification of the list of candidates to be assessed by the advisory committee.

Second, the provincial attorney(s) general from the region would nominate a member of the advisory committee. Third, the advisory committee, with ample provincial representations, would participate in the consultation and evaluative process of the initial list of candidates, and the determination of the short list of three candidates.

Fourth, there will be input and advice from other nominees from the region, including the local law societies, chief justices and lay people.

These are the principles upon which the Government's proposal is based. At the same time, we have had to take into account a number of practical considerations.

The first is the fact that appointments to the Supreme Court must be made within a limited time frame. A revised appointments process must be capable of being established, mandated and having completed its considerations and recommendations within a few months, at the outside. At the same time, members of the advisory committee – whether they be Parliamentarians, prominent academics, judges, representatives of legal organizations or other prominent Canadians – will be busy people who must slot in the demands of participating this process in with their other obligations. In deciding what tasks we are going to ask the advisory committee to perform, we have to keep this in mind.

The second practical consideration is that the advisory committee should be of a sufficiently manageable size to facilitate the operations of the committee and promote the goal of achieving a work product in a timely fashion.

Finally there is the issue of confidentiality. Confidentiality is the most critical prerequisite to ensuring the effective operation and public credibility of the revised process. The prospect of breaches of confidentiality could result in a future reluctance on the part of those consulted to provide candid and forthright assessments, and thereby undermine the effectiveness of the process. It could also inhibit candidates' willingness to agree to have their names put forward, and thereby undermine the principle of excellence.

These general principles and practical considerations are not always easy to reconcile. For example, the need to preserve confidentiality must be harmonized with the goal of increased transparency. Demands for a high degree of provincial input must be addressed in the context of the federal Cabinet's authority over appointments. Ultimately, the question is one of striking the right balance between all of the various principles and considerations.

The Government has engaged in thoughtful study and spent more than a year considering the wide range of views that have been expressed on this issue. It is satisfied that this proposal represents a very delicate and careful reconciliation of all of these concerns. We are open to suggestions on how this proposal may be refined, but in our view – after more than a year of debate and discussion on these issues – we are now prepared to move forward using this proposal as the template for a new appointments process.

May I turn now to a description of the Government's proposal. I will first give you a quick overview of the basic elements of the new process before taking you through the specifics.

We are proposing a four-stage process.

First, the Minister of Justice would conduct a consultation process very similar to the current process to identify prospective nominees. I have already made public the protocol of those to be consulted. This would result in a list ordinarily in the range of five to eight candidates, depending on the region, who would be assessed by an advisory committee.

At the second stage, an advisory committee would be established to themselves engage in a consultation and evaluation process, and to assess the candidates based on a written mandate from the Minister and established criteria as are contained in the public protocol. The advisory committee would then provide the Minister with a short list of three candidates, along with a commentary on the strengths and weaknesses of each candidate on the short list.

At the third stage, the Minister and the Prime Minister would complete any further consultations as considered necessary and the Prime Minister would recommend a candidate to the Governor in Council.

Finally, the Minister would appear before the Justice Committee as soon as possible after the appointment to explain the process and the personal and professional qualities of the candidate selected, as I did before the *ad hoc* committee last summer.

May I now move on to the more specific aspects of this proposal. It is important to recall that candidates for the Supreme Court come from the region where the vacancy originated – be it the Atlantic , Ontario , Quebec , the Prairies and the North, and British Columbia regions. This is a matter of practice, except for Quebec where the *Supreme Court Act* establishes a requirement that three of the justices must come from Quebec . And we appreciate – as I have said elsewhere – the juridical specificity of Quebec 's civil law tradition which finds expression in this requirement. As well, as is traditionally the case, consultations would therefore be focussed on the region from which the vacancy arose.

At the first stage, when the Minister of Justice is developing the initial list of five to eight names, the Minister would consult with the persons who are consulted now – the Chief Justice of Canada, the provincial Attorneys General in the region where the vacancy arose, the chief justices in the region, the local law societies and the Canadian Bar Association. The Minister would also publicly invite the written views of any person or group with respect to meritorious candidates. This is to ensure that there is a broad base of input into the initial list.

Given that some candidates might not wish to have their names considered through this new process, the Minister would seek the prior consent of candidates before putting their names forward.

At the second stage of the process, an advisory committee would be established each time a vacancy arose. This is appropriate given the regional nature of appointments, which would be reflected in the advisory committee membership.

The advisory committee would be composed of:

- one MP from each recognized party in the House;
- one retired judge, nominated by the Canadian Judicial Council;
- one member nominated by the provincial Attorneys-General in the region;
- one member nominated by the provincial law societies in the region; and
- two eminent lay people of recognized stature in the region, nominated by the Minister. When I say "lay people" I mean people who have never been either judges or lawyers.

You may have noticed that I stayed away from describing committee members as "representatives". This was deliberate. We do not intend that the members of the advisory committee be representatives of particular constituencies or points of view. Rather, they bring a diverse set of experiences and perspectives to a common enterprise of assessing candidates for the Supreme Court or the merit-based principle.

The Minister would provide a mandate letter to the advisory committee, setting out the objectives of the committee, describing the merit-based criteria, establishing timeframes and providing for general procedure particularly in relation to confidentiality. The Minister would also meet with the Committee before it begins its work to clarify these issues and to underscore the importance of collegiality and confidentiality in conducting the advisory committee's work.

The advisory committee would be empowered to seek the consent of the Minister to assess additional candidates not on the original list. Before consenting, the Minister would once again consult with those whose views he sought in relation to the first list. If the Minister agreed that the new candidate should be assessed, the candidate would, once again, be contacted to ensure he or she was agreeable to having their name stand.

The committee's assessment of the candidates would be based on an appreciation of the relevant experience and expertise of the candidates, and on a paper review – CVs, judgments, articles and so on – as well as consultations with third parties. This was the approach taken by a majority of

the Justice Committee in its May 2004 Report.

We agree with the Justice Committee – and this also represents the preponderant view of the many consulted -that there should be no in-person interviews. The view expressed was that it was doubtful whether such interviews would elicit relevant information not otherwise available to the Committee through other sources, including the comprehensive consultative and evaluative process. Also, despite the merit-based criteria, it could be difficult to control the direction of questioning.

The advisory committee would work on a democratic basis, with key committee decisions requiring a consensus or majority vote. Such decisions would include who should be consulted, whether an additional candidate should be proposed, and who should be on the short list.

Turning now to the question of confidentiality, it goes without saying that the task of assessing candidates for the Supreme Court is extremely important and sensitive. For the advisory committee process to work effectively – for it to work at all – it is vital that individuals who are consulted by the advisory committee be completely candid in their assessments. For the same reason, as recognized by the Justice Committee, it is essential that there be the widest possible scope for discussion within the committee. Candid discussions are only possible when the participants can be assured that their views are being held in the strictest of confidence. In addition, robust protections for confidentiality will reassure potential candidates who might otherwise be hesitant about having their names put forward for consideration.

Confidentiality would be required not only of committee members but also to those who are consulted with respect to individual candidates. Given the intense public interest in these appointments, the latter may present a greater challenge. For these reasons, committee members as well as those who are consulted will be asked to enter into written confidentiality agreements.

It is true that there can be no guarantees that these undertakings will never be breached. However, I do believe that the collegial nature of this process, the stature and reputation of the members of the advisory committee, and the national importance of the task will discourage individuals from violating these obligations. A person who decided to undermine such an important process – potentially damaging individuals and the institution of the Court – would face significant public condemnation. This will itself act as a strong deterrent to such mischief-making.

Once its deliberations are complete, the advisory committee would provide a confidential short list of three names to the Minister, along with a commentary on the strengths and weaknesses of the candidates on the short list. In addition, the committee would provide the Minister the full record of consultations and other material that it relied on. If for any reason the Minister felt that the record of consultations was incomplete, the Minister could request the advisory committee to conduct further consultations.

The third stage of the process involves the selection and appointment of a person from the short list. The Minister would complete consultations concerning the short list and make a recommendation to the Prime Minister.

In all but the most exceptional circumstances, the candidate will be appointed from the short list. The proviso of "exceptional circumstances" is there as a safety valve. It is principally intended to recognize the legal reality that the ultimate responsibility to make these appointments lies with Cabinet.

But it is also there for a practical reason. In implementing this new process, the Government is taking a bold step forward. We simply cannot anticipate every possibility or turn of events in the future. At some point in the future, the advisory committee process may be significantly undermined by a major breach of confidentiality. In such a case, it would not only be the right of the Government, but its responsibility, to put a stop to the process and make the appointment in

the manner it has been done to date.

In my view, it will be exceedingly rare for a government to ever make an appointment from outside of the short list. I say this for three reasons. First, a Government would not want to face the significant public criticism that would arise from an exercise of this power. Second, a decision to appoint from outside the list would seriously undermine the credibility of the appointments process. Third, the exercise of such a power would affect the willingness of prominent Canadians to serve on future advisory committees. You only have to ask yourselves why an advisory committee member would do all this work if there was a real risk that the Government would ignore the committee's recommendations.

At the fourth and final stage, after the appointment has been made, the Minister would appear before the Justice Committee to explain the nomination process and the personal and professional qualities of the candidate. This would be similar to my appearance before the *ad hoc* committee last summer, though in this proposal, it follows upon three other considered stages as set forth above.

While there was some criticism of that process last year, I believe it did provide the public with an introduction to the process and an insight into the candidates. This can only enhance the transparency and public understanding of the process, as well as of the qualities that the new judge will bring to this critically important national institution.

That concludes my detailed description of the Government's proposal.

Mr. Chair, members of the committee, may I once again express my appreciation to the many people – both within and without my Department – who contributed to the valued discussion that inspired this proposal. As well, the hearings before both committees last year were extremely useful in illuminating the various perspectives and options and underscoring some of the difficulties in grappling with this important issue. Although there may be countless different ways of arriving at a resolution of this question, in my view the Government's proposal is the one that best reconciles all the relevant considerations.

Mr. Chair, the Supreme Court of Canada is a pillar of our constitutional democracy. It deserves – and the Parliament the public deserve – an appointments process that is commensurate with that excellence and will respect it. We believe that this proposal – providing as it does for parliamentary, provincial and public input – does exactly that.

Thank you. I am happy to take your questions.

Date Modified: **2008-04-14**